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Supreme Court of the United States

OCTOBER TERM, 1962.

No. 952

STATE OF OHIO, EX REL.
SAMUEL H. SHEPPARD,
PETITIONER,

v.

MAURY KOBLENTZ,
COMMISSIONER OF CORRECTION
OF THE STATE OF OHIO,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETER W. PRINCI
F. LEE BAILEY
40 Court Street
Boston 8, Massachusetts
Attorneys for petitioner.

RUSSELL A. SHERMAN
203 Lorain County
Bank Bldg.
Elyria, Ohio
Of Counsel

John F. Bergin — Law Printer — Box 671 — Brookline 47, Mass.

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Petitioner, Samuel H. Sheppard, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above-entitled case on December 27, 1962.

Opinion Below.

The opinion of the Supreme Court of Ohio is reported in 174 O. S. 120, and in 187 N.E. 2d 40, and is printed at p. 8 in Appendix A.

Jurisdiction.

Petitioner contends that the judgment of the Supreme Court of Ohio operates to deny him the effective aid of counsel as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, and invokes the jurisdiction of this court under 28 U.S.C. § 1257(3).

Question Presented.

Does one convicted of felony and incarcerated in a state penal institution, who has retained counsel to discover and produce evidence of said inmate's innocence, for use in proceedings to secure said inmate's release, have a constitutional right to have third persons enter said institution to assist counsel in discovering and producing such evidence?

Constitutional Provisions Involved.

The Fourteenth Amendment provides, in part (Section 1.),

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case.

Petitioner was convicted of the second-degree murder of his wife in the Court of Common Pleas of Cuyahoga County, Ohio, on December 21, 1954. The conviction was affirmed by the Supreme Court of Ohio (*State of Ohio* v.

Sheppard, 165 O.S. 293); a petition for a writ of certiorari was denied by this court (*Sheppard* v. *State of Ohio*, 352 U.S. 910), and a petition for rehearing was similarly denied (*Sheppard* v. *State of Ohio*, 352 U.S. 955).

Petitioner has at all times maintained his innocence of the crime in question. His conviction was based wholly on circumstantial evidence. In 1962 his counsel sought to bring into the Ohio penal institution where petitioner is confined certain experts, for the purpose of (1) interrogating petitioner under hypnosis to penetrate amnesia clouding his recollections of the incident of the murder, and (2) to submit petitioner to a polygraph test. The Commissioner of Correction of the State of Ohio (respondent in this action) denied counsel permission to bring said experts into the prison. Petitioner thereupon filed two petitions for writs of mandamus in the Supreme Court of Ohio, asking that respondent be ordered to comply with petitioner's request. These petitions were consolidated for hearing and judgment, and are therefore consolidated in this petition for a writ of certiorari. Both cases were decided upon demurrers filed by respondent.

Reason For Granting the Writ.

The right of an accused to the assistance of counsel at every stage of a criminal proceeding is well settled, whether the proceeding be federal or state. The question presented by this case seeks to determine the limits and definition of the "right to counsel," especially as applied to the adjunctive right to have counsel assisted by third persons where necessary.

As a result of the decision of the Ohio Supreme Court, review of which is herein sought, there exists a sharp conflict between states as to the extent of a right guaranteed by the federal constitution. The right in question

affects not only the petitioner, but every prisoner, state and federal, incarcerated in a penal institution in the United States.

The State of Ohio has decided a federal question of substance not heretofore determined by this Court, in a way probably not in accord with the decisions of this Court enunciating the fundamental right to counsel. It is therefore desirable that the question presented be settled by this Court, in order that the federal right in question may be uniformly recognized and asserted throughout the jurisdictions of the United States.

Argument.

The right of counsel, guaranteed by the Fourteenth Amendment, should be construed to mean the "effective" right to counsel to the extent that third persons may accompany counsel to private consultations with his client, when the services or assistance of such third persons is essential to the preparation of the case.

In his first petition for mandamus to respondent, petitioner alleged that on the night his wife was murdered he was twice rendered unconscious while struggling with the actual murderer, and as a result suffered traumatic amnesia which prevented him from having a clear recollection of all that occurred. He further alleged that through the science of hypnosis, such amnesia could be penetrated enabling him to recall what he saw and heard more clearly, perhaps to the extent that he could identify the actual murderer.

In his second petition for mandamus, petitioner alleged that his counsel had arranged for him to submit to a polygraph test, a scientific means by which he could demonstrate his innocence and thereafter seek relief from his wrongful incarceration. He further alleged that he would

produce the testimony of psychiatrists, psychologists, physiologists, lawyers and polygraph examiners who would testify that the polygraph method of deception testing is over ninety-five percent accurate when properly used, and is generally scientifically accepted as valid.

The Supreme Court of Ohio, in sustaining the demurrers, held that "There is no question that an accused has a right to confer with his counsel . . . [with an] interpreter if necessary, but such right to counsel stops at that point; . . . " (174 O. S. at 121-2).

Petitioner contends that this view of the fundamental right involved must be held to be erroneous. Under such a rule the powers of an attorney to properly prepare or present a case may be so foreshortened and restricted as to prevent him from doing his duty as a lawyer, thus denying to an accused the *effective* right to counsel.

There are a few cases in the United States dealing with the right of a prisoner to have the assistance of third persons with his counsel. Prior to the decision in this case, the weight of authority was favorable to the petitioner. 72 A.L.R. 2d 1120 (annotation); 23 C.J.S. Criminal Law s. 979(6).

In support of his petition for mandamus, petitioner relied on the reasoning and principles enunciated in *Cornell* v. *Superior Court*, 52 Cal. 2d 99, 338 P. 2d 447, 72 A. L. R. 2d 1116 (1959). In that case mandamus was sought in the Supreme Court of California to require prison officials to admit a hypnotist to assist counsel in penetrating the amnesic mind of his client. In granting the writ, the court said:

> "The basic right involved is not limited simply to meetings between the client and his counsel. If necessary, third persons may accompany counsel during his consultations with his client." (p. 103).

Under the present state of the law in Ohio, resulting from the decision in the instant case, no one but an attorney and an interpreter may enter the prison except at the whim of administrative officials in the Department of Correction. Thus if it were necessary to take a sample of an accused's blood, a fingerprint, a photograph or a recording of his voice, or to make a paraffin test of his skin to determine the presence of gunpowder remnants, in the course of counsel's investigation or preparation, the accused would find himself wholly at the mercy of the warden. Where, as in this case, the accused himself is the only possible source of the scientific evidence sought, he can have no relief. Such a situation clashes violently with fundamental concepts of the fair administration of justice.

Inasmuch as the decision of the Supreme Court of Ohio rests upon a demurrer, the validity of that decision should be tested by assuming that had relief been granted, the scientific findings would have favored petitioner. It should be assumed that petitioner was enabled to recall (subconsciously, under hypnosis, and consciously thereafter) the identity of the murderer who assaulted him, or the identity of the voice of the murderer; that subsequent investigation could establish the guilt of that individual, and the consequent of innocence of petitioner. It should further be assumed that petitioner was cleared by the polygraph test, and that at a subsequent proceeding (either judicial or executive) the validity of the test was established sufficiently to warrant petitioner's release. In the face of developments of this nature, which reasonably could result from the granting of the relief sought, it is manifest that the judgment of the Ohio court has operated to deprive petitioner of his most basic and fundamental rights.

The fact that a jury, operating within the limits of its function, makes certain findings of fact which are not so

clearly erroneous as to require reversal on appeal does not mean that such findings are absolute, or that they are not subject to disproof upon the discovery of new evidence. It is a matter of common knowledge that criminal convictions have been factually erroneous in the past, for the jury system is not perfect. If counsel seeking to demonstrate factual error is to be hamstrung in his investigations by petty administrative officials, the chances of clearing innocent men become increasingly remote.

It should also be noted that the second petition for mandamus alleges that in 1950 the State of Ohio permitted an inmate named McLure to submit to a polygraph test inside the prison. This fact is admitted by the demurrer. Thus it is clear that by ruling that such matters are completely within the discretion of respondent, the Supreme Court of Ohio is denying to petitioner the equal protection of the laws, or at least sanctioning such a denial.

It is not contended that petitioner would have a right of consultation with the experts in question under other circumstances, but only that the right to counsel should be construed as including, adjunctively, the right to have such experts assist.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER W. PRINCE
F. LEE BAILEY
40 Court Street
BOSTON 8, Massachusetts
Attorneys for petitioner

RUSSELL A. SHERMAN
203 Lorain County
Bank Bldg.
Elyria, Ohio
Of Counsel

APPENDIX A.

Statement of the Case.

The motion for leave to intervene is sustained.

The relator being afforded an adequate remedy in the ordinary course of the law, the motion to dismiss the case is sustained.

Case dismissed.

WEYGANDT, C. J., ZIMMERMAN, TAFT, MATTHIAS, RADCLIFF, O'NEILL and GRIFFITH, JJ., concur.

RADCLIFF, J., of the Fourth Appellate District, sitting by designation in the place and stead of HERBERT, J.

THE STATE, EX REL. SHEPPARD, *v.* KOBLENTZ, COMMR. OF CORRECTION. (Two cases.)

Criminal law—Prisoner convicted of crime—Hypnosis or polygraph test to demonstrate prisoner's innocence—Allowing such discretionary with officer controlling penal institutions—Chief of Division of Correction—Mandamus not available to compel such tests.

There is no clear legal duty on the part of the Chief of the Division of Correction of the Department of Mental Hygiene and Correction to permit a prisoner to subject himself to hypnosis or a polygraph test in order to demonstrate his innocence of the crime for which he was convicted and, the allowing of such tests being strictly within the discretion of such officer, a writ of mandamus does not lie to compel such tests. (Nos. 37514 and 37641—Decided December 26, 1962.)

IN MANDAMUS.

These are actions in mandamus originating in this court and will be referred to herein in the singular.

Relator, Samuel H. Sheppard, was convicted of second degree murder in the Common Pleas Court of Cuyahoga County for the death of his wife in 1954. His conviction

was affirmed by the Court of Appeals, the judgment of the Court of Appeals was affirmed by the Supreme Court of Ohio, and a petition for a writ of certiorari was denied by the Supreme Court of the United States. Throughout those proceedings, as well as here, he has maintained his innocence and contended that due to certain injuries he allegedly suffered on the night of the killing he was afflicted with a period of amnesia.

The purpose of the present action is to compel the Chief of the Division of Correction of the Department of Mental Hygiene and Correction to allow relator to submit himself to hypnosis and a polygraph test to establish his innocence. A demurrer to the petition has been filed by the respondent. Inasmuch as the same basic principles of law are dispositive of the issues in both these cases, they have been consolidated for the purpose of this opinion.

Mr. F. Lee Bailey and *Mr. George H. Faust*, for relator.

Mr. Mark McElroy, attorney general, and *Mr. Aubrey A. Wendt*, for respondent.

COLLIER, J. The basic issue raised in this case is whether the respondent is under a clear legal duty to permit prisoners under his control to undergo hypnosis and polygraph tests for the purpose of establishing their innocence of the crimes for which they were convicted.

It is fundamental that a writ of mandamus will not issue in the absence of a showing of a clear legal right to the relief sought by relator and, conversely, of a clear legal duty of the respondent to perform or permit the demanded relief.

Relator bases his right in part on the constitutional right to effective assistance of counsel. He cites in support of this claim the case of *Thomas, Warden, v. Mills*, 117 Ohio St., 114, which holds that a prisoner confined in the penitentiary after conviction has a constitutional right to confer with his attorney on matters relating to an

appeal, and the case of *People* v. *Larrios*, 220 Cal. 236, which holds at least inferentially that an accused who does not speak English has a right to converse with his attorney through his own interpreter. Neither of those cases is applicable to the present situation. There is no question that an accused has a right to confer with his counsel and through the medium of his own interpreter if necessary, but such right to counsel stops at that point; no right exists in an accused as an adjunct to the right of counsel to have such counsel assisted by experts in exploring the innermost recesses of the accused's mind to prepare his case.

The right to counsel, so far as the constitutional mandate is concerned, extends only to the right of representation by an attorney, it does not include the multitude of experts often employed in the preparation of criminal cases both by the state and by the accused.

Relator urges further that his conviction does not deprive him of his civil rights, that the average person can consult with whom he pleases and undergo any test that he wishes, and that, therefore, he has the same rights as any ordinary citizen. This is of course not true. Once one has been convicted of a crime and incarcerated in a penal institution, even assuming he has not lost all the rights of an ordinary citizen, such rights necessarily are subject to the rules and regulations of the penal institution. So far as relator is concerned, the rights which he may enforce are only those which are conferred on him as a matter of law. The right to the tests which he seeks is not so conferred.

The respondent in the instant case has control over the penal institutions in this state. It is his duty to manage and regulate these institutions so that they will fulfill the purpose for which they were created. As a part of the regulation thereof, it is within his discretion as to who

shall have access to the prisoners, and, with the exception of counsel, any person is permitted access to the prisoners only through his discretion. In the present case, his refusal to allow access to relator by the various experts necessary to perform the tests desired was clearly a matter within his own discretion, and a court will not interfere with the exercise thereof. The court can no more compel the respondent to permit these tests than it could prevent them if respondent and relator had agreed thereto.

There is no clear legal duty on the part of the Chief of the Division of Correction of the Department of Mental Hygiene and Correction to permit a prisoner to subject himself to hypnosis or a polygraph test in order to demonstrate his innocence of the crime for which he was convicted; and, the allowing of such tests being strictly within the discretion of such officer, a writ of mandamus does not lie to compel such tests.

The relator urges also that even though there is discretion in respondent his refusal to permit such tests amounts to a gross abuse of discretion. Upon what the relator bases his allegation in this respect is somewhat vague. If it is the fact that he continually protests his innocence, this certainly is no basis for determining that the refusal constituted an abuse. The very great majority of persons confined in penal institutions continually protest their innocence. Apparently the only basis for such claim is that relator has been refused the right to have these tests.

To show an abuse of discretion it is necessary to show more than an error of judgment; rather it is necessary to show an act that is fostered by perversity of will, passion or prejudice. *Alliance* v. *Joyce*, 49 Ohio St., 7, 22, and *State, ex rel. Wilms*, v. *Blake et al., Industrial Commission*, 144 Ohio St., 619, 624.

The demurrer in the instant case is in the nature of a technical demurrer having the effect of a general denial and does not have the effect of admitting the innocence of the relator; it merely raises the issue of the duty of respondent in this matter.

Inasmuch as no clear legal duty is shown in the instant case, the demurrer is sustained and the writ denied.

Demurrers sustained and writs denied.

ZIMMERMAN, acting C. J., KERNS, TAFT, MATTHIAS, RADCLIFF and GRIFFITH, JJ., concur.

ZIMMERMAN, J., sitting in the place and stead of WEYGANDT, C. J.

KERNS, J., of the Second Appellate District, sitting by designation in the place and stead of ZIMMERMAN, J.

COLLIER, J., of the Fourth Appellate District, sitting by designation in the place and stead of HERBERT, J.

RADCLIFF, J., of the Fourth Appellate District, sitting by designation in the place and stead of O'NEILL, J.

APPENDIX B.

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or

comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[28 U.S.C. § 1257]

"§ 1257. **State courts; appeal; certiorari.**

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) . . .

"(2) . . .

"(3) By writ of certiorari, where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

"(June 25, 1948, ch. 646, 62 Stat. 929.)"